A **ARUNAMARI PLANTATIONS SDN BHD & ORS**

v.

LEMBAGA MINYAK SAWIT MALAYSIA & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S7-21-288-2008]
27 APRIL 2010

C ***REVENUE LAW:*** *Customs duty - Cess on oil palm product - Application to strike out certain regulations of Malaysian Palm Oil Board Act 1998 and orders made thereunder - Violation of provisions of Act and Federal Constitution - Payment of cess into Consolidated Fund - Consultation with Minister of Finance - Exemption from tax -* D *Discriminatory legislation - Purpose for collection of cess ultra vires the Act - Malaysian Palm Oil Board Act 1998, ss. 33, 35, 77(1) - Federal Constitution, arts. 8, 97(1)*

CUSTOMS AND EXCISE: *Customs duty - Cess on oil palm product* E *- Application to strike out certain regulations of Malaysian Palm Oil Board Act 1998 and orders made thereunder - Violation of provisions of Act and Federal Constitution - Payment of cess into Consolidated Fund - Consultation with Minister of Finance - Exemption from tax - Discriminatory legislation - Purpose for collection of cess ultra vires the* F *Act - Malaysian Palm Oil Board Act 1998, ss. 33, 35, 77(1) - Federal Constitution, arts. 8, 97(1)*

CONSTITUTIONAL LAW: *Legislature - Impugned regulations - Application to strike out certain regulations of Malaysian Palm Oil Board Act 1998 and orders made thereunder - Violation of provisions of Act* G *and Federal Constitution - Payment of cess into Consolidated Fund - Consultation with Minister of Finance - Exemption from tax - Discriminatory legislation - Purpose for collection of cess ultra vires the Act - Malaysian Palm Oil Board Act 1998, ss. 33, 35, 77(1) - Federal Constitution, arts. 8, 97(1)*

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This was the plaintiffs' application by way of encl. 1 for certain regulations of the Malaysian Palm Oil Board Act 1998 ('Act') and orders made thereunder to be struck out on the ground that they violated several provisions of the Federal Constitution ('FC'). The I plaintiffs primarily targeted the Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 ('Cess Order 2007') – made by the

2nd defendant ('Minister') under the authority of s. 35 of the Act – which provided for the levy and collection of cess by the 1st defendant, the Malaysian Palm Oil Board ('Board'), from oil palm fruit producers on oil palm fruits. The plaintiffs contended that the Cess Order 2007 was *ultra vires* the FC and the Act on, *inter alia*, the following grounds: (i) the Cess Order 2007 did not provide for payment of the cess as federal tax into the Consolidated Fund under art. 97(1) of the FC; (ii) the Cess Order 2007 did not reflect any consultation with the Minister of Finance; (iii) the Cess Order 2007 had the effect of being discriminatory and allowed the Minister to exempt individuals or companies from the tax to be imposed; and (iv) the Cess Order 2007's declared purpose of providing a subsidy for keeping down the price of cooking oil was not authorised by either the FC or the Act and was, thus, not a lawful purpose for which a tax could be imposed.

Held (granting an order in terms of prayer (h) of encl. 1):

(1) It is clear that Parliament has authorised the Minister to impose cess on terms as set out in s. 35 of the Act and the money collected for cess must be deposited into the Malaysian Palm Oil Board Fund ('Fund') to be managed by the Board and used only for the purposes set out in s. 33 of the Act. Considering the underlying purposes for which the powers of collection of cess has been granted to the Minister, the power to levy cess – bearing in mind that the Federal Court has held that cess is a tax – is constitutional, adopting the purposive approach as the courts are enjoined to do. The funds collected by cess are paid into the Fund and the Federal Government also contributes annually to the Fund. Since Parliament has legislated to create the Fund and provides the mechanism for its creation and its use, the argument that all tax collected by way of cess should be placed in the Consolidated Fund must be rejected. Parliament must have intended for collection of cess to be allowed so that the proceeds of cess could be used for the benefit of the industry. *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* (foll). (paras 7 & 8)

(2) As for the plaintiffs' point that the Minister had not consulted with the Minister of Finance as the Minister is required to do under s. 35 of the Act, the English version of the gazettes clearly showed that consultation took place. (para 9)

(3) In respect of the plaintiffs' submission that the Cess Order 2007 under s. 35 of the Act had the effect of being discriminatory, the Minister had explained in para. 6 of the Gazette Notification why certain parties were exempted. Since the Minister had complied with s. 77(1) of the Act, it was not for this court to challenge a valid decision of the Minister. Referring to the point of discriminatory legislation generally, this court agreed with the Board's counsel's submission that art. 8 of the FC is not absolute and adopted the principles set out in *Datuk Haji Harun Haji Idris v. PP. AM-EL Holdings Sdn Bhd & Ors v. AEH Capital Sdn Bhd* (foll); *Datuk Haji Harun Haji Idris v. PP* (foll). (paras 10-12)

(4) It was clear from the booklet distributed by the Board (at its briefing in Sitiawan, Perak) and the Minister's affidavit that the purpose for collecting cess was to subsidise the price of cooking oil at that time, which was clearly not one of the purposes that funds from the Fund managed by the Board pursuant to s. 33 of the Act could be used. Since there appeared to be no provision that enabled the Board to expend funds outside the scope of s. 33 of the Act, the purpose for the collection of cess under the Cess Order 2007 was *ultra vires* the Act and void and illegal. (para 13)

Case(s) referred to:

ABL International Ltd & Anor v. Export Credit Guarantee Corp. of India Ltd & Ors [2004] 1 LRI 666 ***(refd)***

AM-EL Holdings Sdn Bhd & Ors v. AEH Capital Sdn Bhd [2008] 4 CLJ 657 CA ***(foll)***

Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(foll)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 81

Federal Constitution, arts. 4(4), 8

Malaysian Palm Oil Board Act 1998, ss. 32, 33, 34, 35, 36, 77(1)

For the plaintiff - T Sudhar (Jeremy Lee with him); M/s Shook Lin & Bok
For the 1st defendant - Abu Bakar Jais; M/s Hisham Sobri & Kadir
For the 2nd & 3rd defendant - Nor Hisham Ismail (Aida Adhha Abu Bakar with him); AG's Chambers

Reported by Suresh Nathan

JUDGMENT

Prasad Sandosham Abraham JC:

[1] Enclosure 1 was heard on 4 February 2010 and continued on 1 March 2010, and after hearing extensive and interesting arguments on the points of law canvassed by respective counsel, I reserved my decision to 31 March 2010 wherein I granted an order in terms of prayers (h) only of encl. 1, and I append below my reasons for so doing.

[2] From a gleaning of the various prayers of encl. 1, it can be observed, that the plaintiff has mounted an attack on the Malaysian Palm Oil Board Act 1998 and the regulations made there under (the said Act) on the grounds it violates several provisions of the Federal Constitution and is therefore unconstitutional and/or *ultra vires* and are praying for certain provisions of the said Act and orders made there under to be struck down. To better understand the application of the plaintiff, there is a need to go through briefly the background facts leading up to this application.

[3] The background facts which are basically found in para 4 to 16 of encl. 2 are as follows:

> The Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 (hereafter "the Cess Order 2007") – was made by the 2nd Defendant (hereafter "the Minister") under the authority of s. 35 of the Malaysian Palm Oil Board Act 1998 (the said "Act") – and came into operation on 1.6.2007. This order 2007 has been revoked from 1/8/2008.
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> 1. The Cess Order 2007 provided for the levy and collection of cess by, the 1st Defendant, the Malaysian Palm Oil Board (hereafter "the Board"), from oil palm fruit producers on oil palm fruits – para 4 of the Cess Order 2007. By virtue of the Cess Order 2007 (para 2) oil palm fruit producers who owned (a) oil palm holding which is not less than 40.46 hectares or (b) oil palm holdings which in aggregate amount to not less than 40.46 hectares, were required to pay the Board a Cess for every metric ton of oil palm fruit produced at the rates specified in the schedule to the Cess Order 2007 (para 3), when the monthly average price of crude palm oil exceeds RM1,500 per metric ton.

2. The following oil palm fruit producers were however expressly exempt from paying cess under the Cess Order 2007 ie, any government land scheme with settlers or individuals participant, planted with oil palm or (b) any oil palm small holding owned by individuals but managed and controlled by government agencies. Hence, the Cess Order 2007 granted an exemption from payment and cess to government or government related schemes such as FELDA, FELCRA, RISDA, KESEDAR, LKPPP, SALCRA, LKTNS, Koperasi Sungai Manilan and Beliawanis.

3. Further, the Cess Order 2007 did not apply to oil palm fruit producers who owned oil palm holding(s) which was/were less than 40.46 hectares. Neither did the Cess Order 2007 apply to millers, refiners, packers, end-producers, end product retailers, suppliers and/or wholesalers. The Cess Order 2007 did not also apply to end users.

4. The reason for the making of the Cess Order 2007 and the imposition of a cess is set out in para 16 of Enc. 2.

[4] Issues raised by the plaintiffs.

(i) whether the Cess Order 2007 is *ultra vires* Article 96 and Article 67 of the Federal Constitution;

(ii) whether the Cess Order 2007 is *ultra vires* the Federal Constitution as it does not provide for payment of the cess as a federal tax into the consolidated Fund under Article 97(1) of the Federal Constitution;

(iii) whether the Cess Order 2007 is *ultra vires* the Federal constitution as its declared purpose of providing a subsidy for keeping down the price of cooking oil is not authorized by federal law under Article 104(3) or at all and is therefore not a lawful purpose for which a tax can be imposed;

(iv) whether the Cess Order 2007 is a discriminatory tax and is *ultra vires* Article 8 of the Federal Constitution;

(v) whether section 77 of the said Act is *ultra vires* the Federal constitution as it confers upon the executive a legislative function;

(vi) whether section 35 of the said Act and the Cess Order 2007 made there under are unconstitutional because of excessive delegation of the legislative power;

(vii) whether section 35 of the said Act is unconstitutional as it confers taxing authority on the executive;

(viii) whether the Cess Order 2007 is invalid and *ultra vires* the said Act as its declared purpose of providing a subsidy for keeping down the price of cooking oil is not authorized or sanctioned by the said Act and is therefore not a lawful purpose for which the cess can be imposed;

(ix) whether the Cess Order 2007 is invalid and *ultra vires* the said Act as the Board is not empowered by the Act to collect cess;

(x) whether the Cess Order 2007 is invalid and *ultra vires* the said Act as there is no power to grant exemptions;

(xi) whether the Cess Order 2007 is invalid, null and void as it does not reflect any consultation with Minister of finance;

(xii) whether the Cess Order 2007 is *ultra vires* the said Act as it seeks to impose a cess on 'oil palm fruits';

(xiii) whether the Cess Order 2007 is *ultra vires* the Act as it seeks to impose tax by way of cess on oil palm fruit producers who are not otherwise subject to such liability under the said Act; and

(xiv) whether the Cess Order 2007 is void as subsidiary legislation that is partial and unequal, manifestly unjust, unreasonable and grossly disproportionate.

[5] The 1st defendant the Malaysian Palm Oil Board submits the various sections of the said Act are valid and do not contravene the Federal Constitution. Counsel for the 1st defendant also raised the point that since the thrust of the plaintiff's challenge seems to be constitutional, leave of the Federal Court (art. 4(4)) of the Federal Constitution is necessary. The 2nd defendant ie, the Minister raises essentially the same arguments but emphasizes that the court has a wide discretion in granting declarations see pp. 11 & 12 of their Written Submissions which sets out the law on the same and the cases cited therein.

[6] It is my judgment, to decide on the points raised by the plaintiff, one has to look at the said Act and in particular s. 35 which is reproduced:

35 (1) The Minister may, after consultation with the Minister of Finance, make orders for the imposition, variation or cancellation of a cess on oil palm products produced in or exported from Malaysia and the orders may specify the nature, amount and rate of the cess person or class

A of persons on whom the cess is imposed (I/ACT A 1222/04 W.W.F 2/7/2004) and the manner of collection of the cess.

(2) Except in so far as may be otherwise provided in any order made under subsection (1), the cess imposed by B such order shall, for the purposes of its collection and for the enforcement of the collection thereof, be deemed to be a customs duty under the Customs Act 1967.

(3) An order made under this section may prescribe different amounts, rates and manner of collection for different C types or grades of oil palm product in relation to different persons or different classes of persons (I/ACT A1222/04 W.E.F. 2/7/2004).

I also reproduce s. 32 of the said Act:

D 32(1) There is established, for the purposes of this Act, a fund to be known as the "Malaysian Palm Oil Board Fund", to be administered and controlled by the Board.

(g) Monies collected or paid under Section 35.

E **[7]** It is clear that Parliament has authorized the Minister to impose cess on terms as set out in s. 35 and the money collected for cess must be deposited into the Malaysian Palm Oil Board Fund to be (see s. 32) managed by the Board and used only for F the purposes set out in s. 33 of the said Act. I am of the view that the said Act is clear in terms and Parliament must have intended to allow the Minister to impose cess for the purposes set out in the act. The Federal Court has dealt with this issue in the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 G MLJ 97 an appeal – where the Federal Court was dealing with the precursor to the Present Act the ie, Palm Oil Research & Development Act 1979, wherein they held by a majority at p. 98.

(1) (per Steve Shim CJ (Sabah & Sarawak), Haidar CJ (Malaya) H concurring) Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statutes.

[8] See also the judgment of Steve Shim CJ (Sabah & Sarawak): at p. 108 of the report. I

[12] With respect, the principle of strict interpretation of statutes enunciated by Rowlatt J could not be regarded as the *locus classicus* on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in *AG v. Carlton Bank* [1899] 2 QB 158, when he said inter alia:

> I see no reason why special cannons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, *viz* to give effect to the intention of the legislature.

[13] In *Luke v. IRC* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v. Inland Revenue Commission* [1982] AC 300 when he said as follows:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...

[14] This is known as the *Ramsay* principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The Ramsay principle of statutory interpretation seems to have entrenched itself (see *Pepper (Inspector of Taxes) v. Hart* [1993] AC 59). In Malaysia, that principle should apply and it must be applied in consonance with Section 17A of the Interpretation Acts 1948/1967 which stipulates:

> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.*

A [15] It is pertinent to note that s. 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the National Land Finance Co-operative. In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statutes. That answers the second question posed.

I therefore hold looking at the underlying purposes for which the powers of collection of cess has been granted to the 2nd C defendant, the power to levy cess bearing in mind, the Federal Court has held that cess is a tax, is constitutional adopting the purposive approach as the courts are enjoined to do. The funds collected by cess is paid into the fund pursuant to s. 32 and it is also pertinent to note that the Federal Government also D contributes annually to the fund. Since Parliament has legislated to create this fund and provides the mechanism for its creation and for its use, I reject the argument that all tax collected by way of cess should be placed in the consolidated fund. I had occasion to look at the rubber industry and the Malaysian Rubber Board E (Incorporation Act 1996) which is similar in terms to the said Act. It is clear that Parliament must have intended that in the Oil Palm & Rubber Industry two pillars of the commodity sector, collection of cess has been allowed so that the proceeds of the cess could be used for the benefit of the industry.

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[9] The plaintiffs' also raised the point that the 2nd defendant had not consulted with the Minister of Finance as the 2nd defendant is required to do under s. 35 of the said Act. I reproduce the English version of the gazettes which clearly shows G that consultation took place: "Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007. In exercise of the powers conferred by s. 35 of the Malaysian Palm Oil Board Act 1998 (Act 582), the Minister after consultation with the Minister of Finance makes the following order (P.U. (A) 200 p. 2264)" and see also s. 81 of H the Evidence Act: "The court shall presume the genuineness of every document purporting to be the Gazette or the London Gazette, or the Government Gazette of any part of the Commonwealth, or to be the Gazette issued by the local Government of any part of the Commonwealth, or to be a I newspaper or journal, or to be a copy of a private Act of Parliament printed by Her Britannic Majesty's Printer, and of

every document purporting to be a document directed by any law to be kept by any person, if the document is kept substantially in the form required by law and is produced from proper custody."

[10] The plaintiffs had in their submissions made the point that the cess order under s. 35 of the said Act had the effect of being discriminatory and allowed the Minister to exempt individual or companies for the tax to be imposed. Section 77(1) of the said Act is now reproduced.

> The Minister may by order published in the Gazette exempt any person or class of persons or any palm products or other thing from all or any of the provisions of this Act.

[11] In the Gazette Notification the 2nd defendant has explained in para 6 the parties exempted and why. I am of the view that since the 2nd defendant has complied with the said section it is not for this court to challenge a valid decision of the 2nd defendant. See the decision of the Court of Appeal in *AM-EL Holdings Sdn Bhd & Ors v. AEH Capital Sdn Bhd* [2008] 4 CLJ 657 civil Appeal Nos W-02-665 of 2004 and W-02-619 of 2000 Court of Appeal (Putrajaya), where the court was dealing with the Power of the Minister of Housing and Local Government to exempt under the Moneylender Act, at para. 28 of the case:

> [28] To conclude on this point, the Minister empowered to grant the exemption under section 2A (2) of the Act is the Minister of Housing and Local Government. The exemption order PU(B) 242/96 is valid and of full legal effect. By reason of the exemption order PU(B) 242/96 issued, in respect of any loan given to AM-EL which is related to credit leasing/share financing, AEH was entitled to impose terms and conditions inconsistent with the provisions of the Act.

[12] Referring to the point of discriminatory legislation generally, I am in agreement with the submission of counsel for the 1st defendant, that art. 8 of the Federal Constitution is not absolute and I adopt the principles set out in *Datuk Haji Harun bin Haji Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155.

> (b) Discriminatory law is good law if it is based on reasonable classification, provided that such classification is:
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> – rational
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> – founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group;

A – there must be a policy or object sought to be achieved by the law in question; and

– there must be a nexus between the basis of classification and the object of the law in question.

B **[13]** It is clear from the booklet distributed by the Board at its briefing in Sitiawan, Perak encl. 2 and the Affidavit of the Minister ie, the 2nd defendant (encl. 20 para 28) the purpose for the collection of cess was to subsidize the price of cooking oil at that time. That in my view is clearly not one of the purposes that C funds from the fund managed by the Board pursuant to s. 33 of the said Act can be used. I had also looked at ss. 34, 35, 36 of the said Act and there appears no provision that enables the 1st defendant to expend funds outside the scope of s. 33 of the said Act. I therefore hold that the purpose for collection of cess under D the impugned Cess Order is *ultra vires* the said Act and is void and illegal. I refer to Federal Court decision referred to *supra* and in particular the judgment of Gopal Sri Ram JCA at p. 118.

> [39] Before considering the three alleged instances of *ultra vires*, it E is apposite to re-state the law governing unauthorized action by the executive as authoritative guidance for the courts in the hierarchy of our judicature. For this purpose, it is convenient to identify executive acts as being either purely administrative in nature on the one hand or as quasi-legislative. Quasi-legislative power is exercised by a member of the administration – usually F one of His Majesty's Ministers – pursuant to a power conferred by Parliament to make subsidiary legislation.
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> [40] The starting point for the present discussion is the source in our jurisdiction of what Anglo-Saxon jurisprudence initially termed as 'administrative law' and which it now refers to by the more G generic expression 'public law' and in which is housed the concept of *ultra vires* or illegality. I use the expression 'illegality' as an alternative to *ultra vires* by freely borrowing it from Lord Diplock's Delphic pronouncement in *Council of Civil Unions v. Minister for the Civil Service* [1985] AC 374.
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> H [51] There are two additional matters that call for emphasis. Firstly, in our jurisdiction – unlike England – any subsidiary legislation to be valid must be *intra vires* the parent statute and the Federal constitution. In *MP Jain's Administrative Law of Malaysia and Singapore* (3rd Edn), the learned author, whose I views are entitled to great respect, has this to say:

> The Parent statute may be constitutional, but the subsidiary legislation made there under may be unconstitutional. The court will strike down delegated legislation, as it strikes down any statute, if it comes in conflict, or does not conform, with a constitutional provision. Here again, reference has to be made to Constitutional Law to assess whether the regulation in question infringes a constitutional provision. The frame of reference to adjudge the validity of the regulation or subsidiary legislation is the Constitution.

[53] Secondly, when determining whether a particular piece of subsidiary legislation is *intra* or *ultra vires* its parent statute, the court is wholly unconcerned with its underlying principles or policy. The subsidiary legislation may have the most laudable social policy at its heart: yet if it is beyond the terms of the delegation extended by Parliament it is invalid.

[54] In *McEldowney v. Forde* [1971] AC 632, Lord Diplock while explaining the role of the courts in the context of the unwritten constitution of the United Kingdom had this to say:

> The division of functions between Parliament and the courts as respects legislation is clear. Parliament makes laws and can delegate part of its power to do so to some subordinate authority. The courts construe laws whether made by Parliament directly or by a subordinate authority acting under delegated legislative powers. The view of the courts whether particular statutory of subordinate legislation promotes or binders the common weal is irrelevant. The decision of the courts as to what the words used in the statutory or subordinate legislation mean is decisive. Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a three-fold task: first to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description. (emphasis added.)

[55] Despite these views appearing in Lord Diplock's dissenting speech in the House, it has acquired much repute and has been quoted by Peh Swee Chin FCJ in this court in *Kerajaan Malaysia v. Wong Pot Heng* [1997] 1 MLJ 437. In *Wong Pot Heng & Anor v. Kerajaan Malaysia* [1992] 2 MLJ 885, Eusoff Chin J at first instance quoted foregoing passage in Lord Diplock's dissent in *McEldowney v. Forde* [1971] AC 632 and said:

A There is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person/body to whom power is delegated to make the rules or regulations, acted outside the legislative powers conferred on him/it by the Act of Parliament under which the rules or regulations were purported to have been made.

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[56] That a court is entirely unconcerned with the underlying principles or policy or popularity of a piece of subsidiary legislation is a proposition that applies equally in a jurisdiction with a written constitution. Thus in *Mabarasbtra SBOS & HS Education v. Partosh* AIR [1984] SC 1548, Balakrishna Eradi J when delivering the judgment of the Indian Supreme Court said:

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The court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rate or regulation will not render it *ultra vires* and the court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and a delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.

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[57] A little later, in the same judgment, the learned judge added:

In the light of what we have stated above the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely, (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provision of the parent enactment; and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution.

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[58] In my considered judgment, it is the threefold test formulated by Balakrishna Eradi J in the above quoted passage that should be applied by our courts when determining the validity of a piece of subsidiary legislation. It must never be forgotten by our courts when adjudicating upon a public law case that all State action must in appropriate cases be in accordance with the terms of any relevant written law but must in all cases be in accordance with the provisions of the Federal Constitution, in particular the fundamental liberties guaranteed by Part II thereof.

[59] It is with these principles in mind that I now turn to consider the question whether the 1979 Order is tainted by substantive *ultra vires*. To recapitulate, the first submission is that the 1979 Act does not authorize the collection of cess from palm oil millers. To determine if there is merit in this complaint, all that is necessary is to examine the Act itself. There is no dispute – indeed there cannot be any – that the 1979 Act does not define the term 'palm oil miller'. Section 14(1) by which Parliament delegates subsidiary law making authority to the Minister reads as follows:

> 14(1) The Minister may, after consultation with the Board and with the Minister of Finance, make orders for the imposition, variation or cancellation of a research cess on palm oil; and the orders may specify the nature, the amount and rate and the manner of collection of the cess.

[60] Be it noted that the section empowers the Minister, *inter alia*, to impose research cess on palm oil: not on palm oil millers. The point of construction here is therefore uncomplicated and straightforward. The 1979 Act did not give the Minister power to make orders imposing a research cess on palm oil millers. And it is not open to this court to read into the section an implied power enabling the Minister to do so. Such a course would constitute unauthorized judicial legislation and a breach of the doctrine of separation of powers enshrined in the Federal Constitution.

[61] In Malaysia, the Federal Constitution has entrusted the law making power to Parliament and the State Assembly of each of the several States of the Federation. While the courts through the common law recognize the power of Parliament to delegate some of its legislative power, it is equally the constitutional duty of the courts to ensure that no excessive delegation takes place. Hence the well settled principle that a provision in a statute conferring power on a member of the executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy – call

A it a tax or charge or cess or whatever you may – upon the whole or any section of the public. It is difficult to find a clearer authority on the point than the decision of the English Court of Appeal in *Attorney General v. Wilts United Dairies Ltd* [1921] 37 TLR 884, which affirmed by the House of Lords. See [1922] 38 TLR 781.

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[14] In the light of the aforesaid, I find the collection of the cess to subsidise the cooking oil price at the material time is *ultra vires* the said Act. I therefore granted an order in terms of prayer (h) encl. (1).

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[15] Having so decided, I now had to consider whether I should grant prayer (n) of encl. 1. The plaintiff submits in the light of my earlier prayer (n) should follow as of course. The defendants in their submission refer to the case of *ABL International Ltd & Anor* D *v. Export Credit Guarantee Corp. of India Ltd & Ors* [2004] 1 LRI 666 wherein the following views were expressed.

> However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should not necessarily follow. We wish to add E that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

F **[16]** I invited counsel to either submit why the court should make an order for refund of cess or the plaintiffs should file a separate action for refund of the cess collected, in view of my ruling.

[17] On the upshot I granted order in terms of prayer (H) of encl. 1 with no order as to costs.

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